

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

**Plaintiff**

V.

CRIMINAL 05-0346 (JAG)

DESIDERIO ECOLÁSTICO DÍAZ,

## Defendant

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION  
RE: RULE 11 PROCEEDINGS (PLEA OF GUILTY)

## I. Personal Background

On October 12, 2005, Desiderio Ecolástico Díaz, the defendant herein, was charged in a two-count indictment.

Count one charges defendant with knowingly and intentionally possess with intent to distribute 100 grams or more of a mixture or substance containing a detectable amount of heroin, a Schedule I, Narcotic Drug Controlled Substance, in violation of 21 U.S.C. § 841(a)(1).

Count two charges defendant with knowingly and intentionally import into the United States from a place outside thereof, that is, the Dominican Republic, 100 grams or more of a mixture or substance containing a detectable amount of heroin, a Schedule I, Narcotic Drug Controlled Substance, in violation of 21U.S.C. § 952.

Defendant filed a motion for change of plea on March 15, 2006.

II. Consent to Proceed Before a Magistrate Judge

On March 23, while assisted by Max Pérez Bouret, Assistant Federal Public Defender, the defendant, by consent, appeared before me in order to change his previous not guilty plea to a plea of guilty as to both counts of the indictment.

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3       In open court the defendant was questioned as to the purpose of the hearing  
 4 being held. The defendant responded that the purpose of the hearing was to plead  
 5 guilty. The defendant was advised of his right to have all proceedings, including the  
 6 change of plea hearing, before a United States district judge. Defendant was given  
 7 notice of: (a) the nature and purpose of the hearing; (b) the fact that all inquiries  
 8 were to be conducted under oath and that it was expected that his answers would  
 9 be truthful (he was also explained that the consequences of lying under oath could  
 10 lead to a perjury charge); and (c) his right to have the change of plea proceedings  
 11 presided over by a district judge instead of a magistrate judge. The defendant was  
 12 also explained the differences between the appointment and functions of the two.  
 13 The defendant consent to proceed before this magistrate judge.

14       III.   Proceedings Under Rule 11, Federal Rules of Criminal Procedure

15           A.   Compliance With Requirements Rule 11(c)(1)

16       Rule 11 of the Federal Rules of Criminal Procedure governs the  
 17 acceptance of guilty pleas to federal criminal violations. Pursuant to  
 18 Rule 11, in order for a plea of guilty to constitute a valid waiver of the  
 19 defendant's right to trial, guilty pleas must be knowing and voluntary:  
 20 "Rule 11 was intended to ensure that a defendant who pleads guilty  
 21 does so with an 'understanding of the nature of the charge and  
 22 consequences of his plea.'" United States v. Cotal-Crespo, 47 F.3d 1, 4  
 23 (1<sup>st</sup> Cir. 1995) (quoting McCarthy v. United States, 394 U.S. 459, 467  
 24 (1969)). [There are three core concerns in these proceedings]: 1)  
 25 absence of coercion; 2) understanding of the charges; and 3) knowledge  
 26 of the consequences of the guilty plea. United States v. Cotal-Crespo, 47  
 27 F.3d at 4 (citing United States v. Allard, 926 F.2d 1237, 1244-45 (1<sup>st</sup>  
 28 Cir. 1991)).

United States v. Hernández-Wilson, 186 F.3d 1, 5 (1<sup>st</sup> Cir. 1999).

In response to further questioning, defendant was explained and he  
 understood that if convicted on count one of the indictment he was exposed to a  
 minimum term of imprisonment of five years and maximum of 40 years, a fine of up  
 to \$3,000,000, and a term of supervised release of not less than four years.

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He was further explained that the court must also impose a mandatory penalty assessment of \$100 per count, to be deposited in the Crime Victim Fund, pursuant 18 U.S.C. 3013(a).

Defendant was advised that the ultimate sentence was a matter solely for the court to decide in its discretion and that, even if the maximum imprisonment term and fine were to be imposed upon him, he later could not withdraw his guilty plea if he was unhappy with the sentence of the court. The defendant understood this.

Defendant was explained what the supervised release term means. It was emphasized that cooperation with the United States Probation officer would assist the court in reaching a fair sentence.

Emphasis was made on the fact that at this stage, no prediction or promises as to the sentence to be imposed could be made by anyone. Defendant responded to questions in that no promises, threats, inducements or predictions as to what sentence will be imposed have been made to him.

#### B. Admonishment of Constitutional Rights

To assure defendant's understanding and awareness of his rights, defendant was advised of his right:

1. To remain silent at trial and be presumed innocent, since it is the government who has the burden of proving his guilt beyond a reasonable doubt.

2. To testify or not to testify at trial, and that no comment could be made by the prosecution in relation to his decision not to testify.

3. To a speedy trial before a district judge and a jury, at which he would be entitled to see and cross examine the government witnesses, present evidence on his behalf, and challenge the government's evidence.

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4. To have a unanimous verdict rendered by a jury of twelve persons which  
would have to be convinced of defendant's guilt beyond a reasonable doubt by means  
of competent evidence.

5. To use the subpoena power of the court to compel the attendance of  
witnesses.

Upon listening to the defendant's responses, observing his demeanor and his  
speaking with his attorney, that to the best of counsel's belief defendant had fully  
understood his rights, it is determined that defendant is aware of his constitutional  
rights.

#### C. Consequences of Pleading Guilty

Upon advising defendant of his constitutional rights, he was further advised  
of the consequences of pleading guilty. Specifically, defendant was advised that by  
pleading guilty and upon having his guilty plea accepted by the court, he will be  
giving up the above rights and would be convicted solely on his statement that he is  
guilty.

Furthermore, the defendant was admonished of the fact that by pleading guilty  
he would not be allowed later on to withdraw his plea because he eventually might  
disagree with the sentence imposed, and that when he were under supervised  
release, and upon violating the conditions of such release, that privilege could be  
revoked and he could be required to serve an additional term of imprisonment. He  
was also explained that parole has been abolished and that there are immigration  
consequences to his guilty plea.

#### D. Plea Agreement

The parties have not entered into any plea agreement. This is a straight plea.

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E. Government's Evidence (Basis in Fact)

The government presented a proffer of its evidence with which the defendant concurred in general.

Accordingly, it is determined that there is a basis in fact and evidence to establish all elements of the offenses charged.

F. Voluntariness

The defendant accepted that no leniency had been promised, no threats had been made to induce him to plead guilty and that he did not feel pressured to plead guilty. He came to the hearing for the purpose of pleading guilty and listened attentively as the prosecutor outlined the facts which it would prove if the case had proceeded to trial.

IV. Conclusion

The defendant, by consent, has appeared before me pursuant to Rule 11, Federal Rules of Criminal Procedure, and has entered a plea of guilty as to both counts of the indictment.

After cautioning and examining the defendant under oath and in open court, concerning each of the subject matters mentioned in Rule 11, as described in the preceding sections, I find that the defendant Desiderio Ecolástico Díaz is competent to enter this guilty plea, is aware of the nature of the offense charged and the maximum statutory penalties that the same carries, understands that the charge is supported by the government's evidence, has admitted to every element of the offense charged, and has done so in an intelligent and voluntary manner with full knowledge of the consequences of his guilty plea.

Therefore, I recommend that the court accept the guilty plea of the defendant and that the defendant be adjudged guilty as to both counts of the indictment.

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3 This report and recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B)  
4 and Rule 72(d) of the Local Rules of Court. Any objections to the same must be  
5 specific and must be filed with the Clerk of Court within five (5) days of its receipt.  
6 Rule 510.1, Local Rules of Court; Fed. R. Civ. P. 72(b). Failure to timely file specific  
7 objections to the report and recommendation is a waiver of the right to review by the  
8 district court. United States v. Valencia-Copete, 792 F.2d 4 (1<sup>st</sup> Cir. 1986).

9 At San Juan, Puerto Rico, this 24<sup>th</sup> day of March, 2006.

11 S/ JUSTO ARENAS  
12 Chief United States Magistrate Judge